BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

REPLY COMMENTS OF TELE-COMMUNICATIONS, INC.

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Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its reply comments in response to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The overarching purpose of Sections 251, 252 and 253 of the Telecommunications Act of 1996 ("1996 Act" or "Act") and of this proceeding is to establish the preconditions for efficient, competitive entry, especially facilities-based entry, into the local telephone market. There are in general two kinds of obstacles to such efficient entry: unnecessary and costly regulations imposed on competitive local exchange carriers ("CLECs") and the incumbent local exchange carriers' ("ILECs") ability and incentive to resist interconnecting with CLECs on

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1 See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (released April 19, 1996) ("Local Competition Notice").

just and reasonable terms and rates. As the Commission observed in the Local Competition Notice, only a framework of specific national rules for interconnection will eliminate these obstacles.

In their comments, the ILECs and certain state regulatory commissions urge the Commission not to intervene in any significant way to set the rules of local interconnection and competition. They essentially argue that state regulatory regimes should be left largely undisturbed and that Congress did not intend that the Commission correct the imbalance in bargaining power between ILECs and CLECs.

But the record abundantly demonstrates that the status quo must be changed to permit competitive entry. The existing market cannot be relied on, in other words, because it is characterized by market failure. Regulations that place barriers to entry by prospective facilities-based providers like TCI must therefore be eliminated. Moreover, regulatory constraints must be placed on the acceptable negotiated outcomes for interconnection. For cable CLECs like TCI, the most important application of such constraints is on the price for the exchange of traffic between networks. As TCI demonstrated in its initial comments, the most efficient short term and perhaps long term approach to the pricing of interconnection, transport and termination is bill and keep.

Below, TCI discusses the specific arguments offered in opposition to the establishment of specific national rules for interconnection in general and to bill and keep in particular. TCI demonstrates the following:

- The Commission has the authority to establish specific national rules, including pricing rules, for both interstate and intrastate interconnection services;
- The Commission must ensure that CLECs are not subject to the duties and responsibilities of ILECs; the imposition of these requirements on CLECs violates both sound policy and the provisions of Section 251;
- The statutory arguments offered in opposition to bill and keep are unpersuasive: the Commission has the legal authority under Section 252(d)(2)(B)(i) to adopt bill and keep;
- The ILECs have mistakenly asserted that bill and keep allows CLECs to terminate traffic on ILEC networks for free; in fact, bill and keep imposes costs on both ILECs and CLECs;
- The other economic arguments offered in opposition to bill and keep and the assumptions regarding the use of forward-looking cost methodologies upon which it is based are flawed;
- The ILECs' arguments to the contrary notwithstanding, bill and keep does not violate the Fifth Amendment prohibition against taking without just compensation.

II. THE COMMISSION HAS THE AUTHORITY TO ADOPT EXPLICIT NATIONAL RULES, INCLUDING PRICING STANDARDS.

The ILECs and state commissions argue that the 1996 Act precludes the Commission from adopting mandatory national standards. They contend that new entrants are supposed to rely solely on the negotiation process and state review to obtain interconnection, unbundled elements, and resale services. In effect, the ILECs and the states seek to render the 1996 Act a nullity. As is clear from their arguments, they would undo the two decades of effort that culminated in the enactment of the 1996 Act. Plainly, Congress did not develop the comprehensive regime set forth in the statute in order to maintain the status quo.

As the reply comments of the National Cable Television Association ("NCTA") demonstrate, the 1996 Act's mandate for "a pro-competitive, de-regulatory national policy framework" demands an end to the balkanized system under which the determination of whether competitors will enter the market depends on the vagaries of 51 jurisdictions. Firm FCC guidance is the only way to ensure that facilities-based competition, on a nationwide level, has a chance of success.

This is particularly true for the development of pricing standards applicable to interconnection, transport and termination. Although states must review interconnection agreements subject to certain pricing standards, it is the responsibility of the Commission to develop those standards in the first instance. Contrary to the assertions of some states and ILECs,[2] Section 252's pricing standards are inextricably linked with Section 251 and, thus, fall within the Commission's

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2 See, e.g., Comments of Colorado Public Utilities Commission at 7-9, 9-10 ("Comments of CoPUC"); Comments of NYNEX at 40-41; Comments of BellSouth at 47-48.

implementing authority under the latter section. The pricing standards explicitly relate back to the requirements of Section 251 and in fact are incorporated by reference into that section.[3] In essence, the pricing standards are federally-imposed constraints on the manner in which states must resolve pricing disputes that may arise in the context of their oversight of interconnection negotiations.

ILECs and states are flatly wrong when they assert that the Commission has no authority to develop these pricing standards. If adopted, arguments such as that of the Colorado Public Utilities Commission ("CoPUC") that "even general pricing or costing policies (e.g., a requirement that rates be based upon TS-LRIC) will substantially interfere with the authority of States to set rates and charges for intrastate services, including local service"[4] would render the Commission powerless to provide uniform national guidance on pricing issues. Leaving the determination of price to negotiations between ILECs and CLECs with grossly disproportionate bargaining power would

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3 See 47 U.S.C. § 252(d)(1) (establishing pricing standards "for purposes of subsection (c)(2) of section 251" and "for purposes of subsection (c)(3) of such section"); id. at 252(d)(2) (establishing transport and termination standards "[f]or purposes of compliance by an incumbent local exchange carrier with section 251(b)(5)"); id. at 251(c)(2)(D) (interconnection must be provided on rates, terms, and conditions in accordance with "the requirements of this section and section 252").

4 Comments of CoPUC at 10-11. See also Comments of Massachusetts Department of Public Utilities at 4.

deprive CLECs of meaningful competitive opportunities: the right to interconnection without assurance that it will be available nationwide at a reasonable price is no right at all.[5]

To buttress their claims that the Commission lacks authority to promulgate explicit national rules, several ILECs argue that Section 2(b) precludes FCC jurisdiction over intrastate services.[6] This contention is in conflict with Congress' direct instruction to the Commission to regulate the intrastate aspects of interconnection. As the NCTA observes, Section 251 expressly empowers the Commission to adopt regulations governing "the transmission and routing of telephone exchange service," an intrastate service.[7] Similarly, Section 251(e)(5) requires the Commission to assume the duties of a state commission in the event the state fails to fulfill its obligations, and Section 253 requires the Commission to preempt state or local rules that "may prohibit or have the effect of prohibiting the ability of an entity to provide any interstate or intrastate telecommunications service." These provisions, taken together, evidence Congress'

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5 See e.g., The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Declaratory Ruling, 2 FCC Rcd 2910, 2913 (1987), aff'd on recon., 4 FCC Rcd 2369 (1989).

6 See, e.g., Comments of Pacific Telesis at 15; Comments of GTE at 4; Comments of Bell Atlantic at 3-7.

7 See NCTA Reply Comments, Section I.A. (citing 47 U.S.C. § 251(c)(2)(A)).

intent to confer federal authority over intrastate matters.[8] As BellSouth correctly observes:

> It makes no sense to interpret the 1996 Act as requiring separate interconnection arrangements for interstate and intrastate communications. Congress delineated roles for both the Commission and the state commissions in implementing Sections 251-252, but nothing in the statute or the legislative history suggests that Congress intended that interconnection be "jurisdictionally" separated.[9]

While states and ILECs evidently would like to wish the 1996 Act away, the Commission has taken an approach in the Notice that is entirely consistent with the pro-competitive goals of Congress. The Commission should follow the course it proposed by adopting explicit national rules, particularly with respect to pricing, as expeditiously as possible.

III. THE COMMISSION SHOULD ENSURE THAT ITS RULES PROMOTE FACILITIES-BASED COMPETITION.

The 1996 Act recognizes that the current regulatory structure governing the local telecommunications marketplace has the effect of perpetuating the ILEC monopolies and limiting consumer choice. Accordingly, Congress adopted a new model for competition that imposes different sets of obligations on ILECs

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8 47 U.S.C. § 253(a),(d) (emphasis added). NCTA explains that the relevant inquiry is whether the 1996 Act in general and Section 251 in particular evidence a congressional intention to confer FCC authority over the intrastate aspects of interconnection and unbundling. NCTA Reply Comments, Section I.A. (citing Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986) ("federal agency may preempt state law . . . when and if it is acting within the scope of its congressionally delegated authority")).

9 Comments of BellSouth at 8.

and new entrants. ILECs are required to provide unbundled network elements and direct interconnection with their facilities, and offer for resale at wholesale rates any telecommunications service.[10] CLECs, in contrast, are not required to unbundle their networks under any circumstances and have no duty to provide resale at wholesale prices.[11]

Despite this explicit tiered regime, the ILECs argue that CLECs should be subject to the same duties and responsibilities as incumbents. Pacific Telesis Group, for example, contends that "[a]ll LECs, not just incumbents, should be required to provide resale of retail services at wholesale prices."[12] GTE echoes this sentiment, arguing that "[r]esale policies applied to ILECs should never be more rigorous than those applied to" CLECs.[13] Similarly, Bell Atlantic asserts that all interconnection and unbundling arrangements provided by an ILEC for a competing carrier should be made reciprocal.[14]

There is no public interest basis for the ILECs' suggestion that CLECs be treated as incumbents. Bell Atlantic's contention that reciprocity of interconnection and unbundling requirements

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10 47 U.S.C. § 251(c).

11 Id. at § 251(b).

12 Comments of Pacific Telesis Group at 89, 91.

13 Comments of GTE at 48; see also id. at 45, n.69.

14 Comments of Bell Atlantic at 31.

is necessary to "put a 'real world' check on potentially unrealistic -- or purely tactical -- unbundling requests" makes no sense. In the "real world," CLECs are required to pay for the network elements and interconnection they order, which is all that is necessary to deter frivolous requests. Clearly, CLECs do not have the resources necessary to engage in the rampant "tactical" ordering feared by Bell Atlantic.

Moreover, as the Department of Justice ("DOJ") observes, "[b]y definition, it is unlikely that new entrants into local telephone markets will possess the kind of market power or control of an essential facility that would justify, under general competition principles, subjecting them to mandatory unbundled access obligations."[15] Only where a firm has attained market dominance through use of a bottleneck facility -- as is the case with ILECs -- should it be required to deal with potential rivals.[16] CLECs have neither the incentive nor the ability to engage in such anticompetitive behavior.

Even if there were some risk that CLECs could make unrealistic requests for unbundled network elements or refuse interconnection and resale requests, the costs of imposing reciprocal obligations on new entrants far outweigh any potential benefits. "[S]addling [new entrants with] the full weight" of

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15 Comments of the Department of Justice at 23.

16 Id.

interconnection, unbundling and resale requirements "will discourage persons from entering the market."[17] Indeed, DOJ notes that "[a]n entrant might be dissuaded from making a facilities investment in the first place, if it knew that it would be forced to share with an ILEC the cost or service differentiation advantage that it would gain from the investment." Prematurely subjecting CLECs to obligations reserved for parties with bottleneck control of essential facilities would undoubtedly frustrate the congressional vision of a competitive market with multiple facilities-based providers.

In any event, the plain language of the 1996 Act precludes imposition of ILEC requirements on CLECs at this time. While Congress gave the Commission authority to reclassify a new entrant as an ILEC, it restricted the exercise of that authority to situations where the new entrant (1) occupies a comparable position in the marketplace; (2) has "substantially replaced" the incumbent; and (3) such treatment "is consistent with the public interest, convenience, and necessity and the purposes of [Section 251]."[18] To date, no CLEC has attained anything close to the market power enjoyed by ILECs. Nor has any CLEC "replaced" -- substantially or otherwise -- an ILEC. Furthermore, as explained above, treating new entrants as incumbents would thwart the goals

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[17] H. Rep. No. 104-204, 104th Cong., 1st Sess. 74 (1995).

[18] 47 U.S.C. § 251(h)(2).

of the 1996 Act by discouraging the development of competitive markets. Accordingly, the Commission could not make a reasoned finding under Section 251(h)(2)(C) that imposing reciprocal unbundling, interconnection, or resale requirements on CLECs is consistent with the public interest and the purposes of Section 251.

Like the ILECs, a number of states fail to recognize that there is no basis for imposing requirements on CLECs beyond those mandated by the statute or the FCC.[19] The CoPUC, for example, argues that it should be allowed to require "symmetrical application" of the ILECs' collocation duties.[20] In addition, the Texas Public Utility Commission states that the obligations of Section 251 "should apply to all telecommunications carriers, incumbent and non-ILECs, equally."[21] In this regard, it believes that non-ILECs should not be "allowed the discretion to determine whether to offer direct or indirect connection to another carrier." Likewise, the Office of Ohio Consumer's Counsel and

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19 Some state commissions argue that the statute explicitly permits states to impose ILEC obligations on non-ILECs. See, e.g., Comments of District of Columbia Public Service Commission at 14 ("the statute cannot reasonably be read as a flat prohibition on state imposition of any incumbent LEC obligation on a party requesting interconnection."); Comments of Pennsylvania Public Utility Commission at 19 ("[S]tates may impose [incumbent LEC obligations] upon other carriers that have not been designated as incumbent LECs by the FCC.").

20 See Comments of CoPUC at 14.

21 Comments of Texas Public Utility Commission at 34.

the Municipal Utilities assert that "obligations imposed on incumbent carriers should be placed on new entrants as well."[22]

Although Congress explicitly conferred upon the Commission the power to provide for the treatment of CLECs as ILECs under certain limited circumstances, there is nothing in the statute that would allow state commissions to make such determinations. As discussed above, Congress specifically promulgated a sliding scale of requirements for ILECs and CLECs, and state-by-state variations would impermissibly alter this carefully considered balance. The Commission should make clear that state actions, such as those described above, are not allowed.

IV. THE RECORD SUPPORTS THE ADOPTION OF BILL AND KEEP FOR THE MUTUAL RECOVERY OF THE COSTS OF INTERCONNECTION, TRANSPORT AND TERMINATION.

For TCI, the most important aspect of any national interconnection regime is the price set for the mutual exchange of traffic between competing carriers. For although TCI expects to provide local telephone services over its own facilities, the company will still require access to ILEC subscribers. Simply put, customers will not subscribe to TCI's telephone services unless they can call ILEC subscribers.

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22 Comments of Office of Ohio Consumer's Counsel at 5; Comments of Municipal Utilities at 10, 11. <u>See also</u> Comments of Michigan Public Service Commission Staff at 9 (Under Michigan law, "<u>any</u> provider of basic local exchange service, whether large or small, incumbent or newly licensed, may not: 'Refuse or delay interconnections or provide inferior connections to another provider.'").

As TCI explained in its initial comments,[23] bill and keep is the optimal approach to the pricing of interconnection, transport and termination service in the short term, and possibly the long term as well. Bill and keep (a) will likely send price signals that are at least as efficient as any other pricing arrangement, (b) prevents ILECs from taking advantage of their superior bargaining power by setting rates for interconnection, transport and termination above incremental cost, and (c) is administratively simple and inexpensive for the interconnected carriers to implement.

In an attempt to prevent the implementation of bill and keep, the ILECs offer an array of legal and economic arguments. They contend that such an approach cannot be legally mandated by federal or state regulators. They similarly argue that it would not allow an economic recovery of costs. Finally, their last effort to deprive the Commission of this efficient solution is to assert that it would violate their Fifth Amendment rights. None of these arguments is persuasive.

A. The Statutory Arguments Against Bill and Keep Are Unpersuasive.

There are essentially three statutory arguments used to try to defeat bill and keep. First, it is claimed that neither federal nor state decisionmakers have the legal authority to mandate bill and keep. Next, the ILECs attempt to avoid the

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23 See Comments of TCI at 26-40.

force of their traditional bill and keep arrangements among adjacent ILECs. Finally, the ILECs attempt to frustrate the policy objectives of Section 252(d)(2) by asserting that either additional interconnection charges should attach, or that "transport" and "termination" subelements must be derived. Each of these is discussed below.

1. The Communications Act Grants Regulators The Authority To Mandate The Adoption Of Bill And Keep.

Several ILECs assert that regulators lack the authority to mandate bill and keep.[24] The ILECs argue that Section 252(d)(2)(B)(i) describes bill and keep as an arrangement in which parties "waive" their right to mutual recovery, an act that can only be performed voluntarily.

This argument bestows upon a single word -- waive -- the power to undermine the overall import of the section in which it is found.[25] The subsection expressly allows for "arrangements

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24 See Comments of NYNEX at 89-90; Comments of SBC at 52; Comments of BellSouth at 73; Comments of Bell Atlantic at 41 Comments of Pacific Telesis at 95. But see Comments of GTE at 57 (conceding that states could order bill and keep if it affords the mutual recovery of costs through offsetting of reciprocal obligations).

25 Even if this argument rested upon an accurate literal reading of the word "waive," it violates well-established canons of statutory construction to allow it to override the unambiguous purpose of the statute. See Time Warner Cable v. Doyle, 66 F.3d 867, 876 (7th Cir. 1995) (where literal application of a statute or a section thereof will produce a result demonstrably at odds with the intentions of its drafters, the agency should adhere to the legislative intent of the drafters).

that afford mutual recovery of costs through the offsetting of reciprocal obligations," a description that is sufficiently broad to encompass bill and keep. It strains credulity to argue that by using the term "waive" in a subsequent illustrative clause,[26] Congress intended to establish a blanket prohibition against any regulator ordering the implementation of bill and keep. If Congress had wanted to prohibit regulators from mandating bill and keep arrangements, it could have done so in no uncertain terms.

Moreover, the ILECs' specific construction of Section 252(d)(2)(B)(i) breaks down when viewed in the context of the 1996 Act as a whole. First, without any regulatory restrictions on the acceptable results of interconnection negotiations, charges for interconnection, transport and termination will likely reflect the bargaining strengths of the carriers. ILECs have the bargaining strength and the incentive to charge a high

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26 The reference to bill and keep arrangements appears in a parenthetical clause as merely an example ("such as") of one type of permissible arrangement, i.e., those which "waive" mutual recovery. It is thus simply an illustration, not a term of limitation. This construction is further supported by reference to the full subsection in question. The language overall appears in the "Rules of Construction" subparagraph (B) of 252(d)(2), set forth to clarify certain arrangements that are not to be construed as being precluded. Simply because Congress listed only bill and keep in this subsection does not suggest that all other arrangements are precluded. Rather, the fundamental question is whether the terms of 251(d)(2)(i) and (ii) are met by bill and keep under conditions, as here, where costs and traffic patterns can reasonably be predicted to be in balance.

price for terminating calls originating on CLEC networks.[27] As a result, ILECs are unlikely ever to agree to adopt bill and keep voluntarily.[28] Thus, the ILECs' interpretation of Section 252(d)(2)(B)(i) essentially reads bill and keep out of the provision. Even though Congress singled this arrangement out for specific approval, according to the ILECs, it defined it in such a way that it would never be adopted.

Further, effectively eliminating bill and keep as a possible option under the statute flies in the face of the pro-competitive goals of the 1996 Act. By denying ILECs the opportunity to overcharge for interconnection, transport and termination, bill and keep lowers a significant barrier to entry into the local telephone business. It would be a strange result indeed to interpret Section 252(d)(2)(B)(i) to prohibit the use of this mechanism.

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27 See Comments of TCI at 38-39. Curiously, NYNEX argues that bill and keep should not be adopted in the interim because it would "distort the negotiations process." Comments of NYNEX at 90. Congress intended precisely that the statutory rules, and implementing regulations established by the FCC, would effect the negotiation process. The 1996 Act was passed quite deliberately to correct the process of negotiating in which the ILECs hold all the cards. See Section II, supra.

28 ILEC interconnection agreements with new entrants now in place rarely contain bill and keep terms, unless mandated by the relevant state.

2. Sections 251 And 252 Apply To Arrangements Between Adjacent LECs For Interconnection, Transport And Termination.

The ILECs also argue that traffic exchanged between adjacent LECs does not qualify as "transport and termination of telecommunications" under Section 251(b)(5).[29] This argument appears to be part of the ILECs' attempt to avoid the application of Section 251(i), the most favored nation status provision, to such agreements.[30] It rests on a flawed contextual argument that the requirements in Sections 251 and 252 were intended for interconnection arrangements between competing carriers only.

As an initial matter, it should be pointed out that a national bill and keep scheme for the exchange of traffic between ILECs and CLECs renders this issue moot. If such a scheme were adopted, the Commission would not have to decide whether the most favored nation status provision applies to the provisions in adjacent LEC agreements concerning interconnection, transport and termination because all ILECs would be already required to adopt bill and keep. Thus, even if the application of Section 251(i) to adjacent LEC agreements were not mandated by the terms of the statute, which it is, the use of adjacent LEC agreements

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29 See Comments of NYNEX at 85; Comments of SBC at 53; Comments of Pacific Telesis at 95-96.

30 Under Section 252(a)(1) "any agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State Commission" for approval.

providing for bill and keep should, as a matter of policy, be adopted as appropriate precedent for competitive interconnection agreements.

Furthermore, as a matter of law, there is no real question that existing arrangements for the exchange of traffic between adjacent carriers should be subject to the Section 251(i). First, agreements between adjacent carriers must be submitted to state commissions for review under Section 252(e). Section 252(a)(1) clearly requires that "any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission[s]" for a determination that such agreements comply with the requirements of the statute. There is no exception made here for agreements between adjacent carriers.

Second, the most favored nation status provision in Section 252(i) applies to any agreement between adjacent LECs approved under Section 252(e). Section 252(i) applies to all interconnection services, including the exchange of traffic, provided under agreements approved by state commissions under Section 252. Again, there is no exception carved out for agreements between adjacent carriers.

Finally, there is no reason to believe that Congress intended that the arrangements for the exchange of traffic between adjacent LECs would somehow be exempt from Section

252(i). Although, as the Commission points out,[31] the larger context of Sections 251 and 252 contemplates arrangements between competing carriers, the duty to provide for the reciprocal compensation arrangements under Section 251(b)(2) is placed on all LECs. The specific references to ILECs in the pricing standards for reciprocal compensation in Section 252(d) are immaterial because those standards do not apply to agreements "negotiated" under Section 252(a)(1), of which adjacent carrier agreements are examples. Thus, to the extent that the issue becomes relevant, it is clear that Section 252(i) applies to interconnection agreements between adjacent LECs in general and to the provisions for the exchange of traffic within those agreements specifically.

3. There Should Be No Separate Charge For Interconnection Equipment Required For The Exchange Of Traffic Between Two Carriers.

The ILECs also explicitly or implicitly assert that CLECs should pay for facilities interconnecting ILEC and CLEC networks for the purposes of exchanging traffic in the same way CLECs pay for similar facilities used for unbundled interconnection.[32] The more appropriate policy approach would be for each carrier to absorb its own costs of interconnecting for the purposes of exchanging traffic.

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31 See Local Competition Notice at ¶ 171.

32 See Comments of Bell Atlantic at 40; Comments of USTA at 10.

When peer networks are interconnected for the purpose of exchanging traffic, the CLEC gains access to the ILEC network and the ILEC gains access to the CLEC network. In the unbundling context, on the other hand, the CLEC gains access to the ILEC network, but the ILEC does not gain access to the CLEC network. This fundamental difference justifies a different approach to the pricing of the equipment used to interconnect the networks. Since each carrier is gaining access to the other carrier in the context of reciprocal compensation, the carriers should simply absorb their respective costs of interconnection equipment used in that context. In the unbundling context, however, the CLEC should pay the rates established under Sections 251(c)(2) and 252(d)(1).

4. The Commission Should Not Establish Separate Rates For Transport And Termination.

The ILECs argue that they should be allowed to charge separate rates for the "transport" and the "termination" of calls. The basis for this argument is the assertion that an obligation to transport traffic to the end office in addition to terminating traffic from the end office to the subscriber will raise the cost of terminating traffic. This additional cost, the argument goes, justifies a separate charge for the transport service.[33]

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[33] <u>See</u> Comments of BellSouth at 71; Comments of GTE at 55.

The disaggregation of the transport and termination charge has not been shown to be required, either by statute or by the underlying economics of the network. It is inconsistent with the statutory admonition that the regulators not engage in precise rate proceedings, and further, that the terms of reciprocal compensation be set upon a "reasonable approximation" of the additional costs of terminating calls. The exactitude which the ILECs' argument seeks, then, could not be achieved within the bounds of the statute. Moreover, even if transport and termination charges were set separately, they would be done by both interconnecting carriers on a forward-looking basis. Thus, the reasonably anticipated offsetting of costs inherent in bill and keep would capture the disaggregation, making it academic. The ILECs' argument should therefore be dismissed.

B. The Economic Arguments Against Bill and Keep And TS-LRIC For Interconnection, Transport And Termination Are Flawed.

As explained in TCI's comments,[34] the cost of interconnection, transport and termination should be determined through the use of a forward-looking methodology, and in particular the total service long run incremental cost approach. An important reason why bill and keep is an appropriate short and possibly long term solution for pricing the exchange of traffic

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[34] See Comments of TCI at 28-34.

between competing carriers is that the TS-LRIC of this service for ILECs and CLECs will likely be very similar.[35]

The economic arguments offered by the ILECs in comments and affidavits criticize both bill and keep and the use of forward-looking cost methodologies (TS-LRIC in particular). Specifically, the ILECs mistakenly assert that bill and keep permits CLECs to terminate traffic on ILEC networks for "free." From this underlying assertion the ILECs derive a number of arguments, all of which conclude that bill and keep is inefficient. Finally, the ILECs argue that forward-looking cost methodologies and TS-LRIC in particular cannot be applied given present market conditions. These arguments should be rejected.

1. CLECs And ILECs Incur Similar Costs Under Bill And Keep.

The economic arguments made against bill and keep almost all flow from an erroneous premise, that is, that bill and keep permits CLECs to terminate traffic without charge on ILEC networks. Indeed, Bell Atlantic asserts that bill and keep "would create a subsidy" for CLECs.[36]

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35 Bill and keep allows interconnected carriers to recover their respective costs for transporting and terminating traffic when the interconnected carriers have (1) balanced traffic flows, (2) concurrent busy hours, and (3) equal per unity capacity costs for transporting and terminating traffic.

36 Comments of Bell Atlantic at 42. See Affidavit of Professor Jerry Hausman, Attachment to Comments of Bell Atlantic ("Hausman") at ¶ 19 ("Bill and keep destroys the correct economic incentives because it makes interconnection 'free'").

In fact, bill and keep arrangements impose costs on both carriers. ILECs bear the cost of terminating calls originating on CLEC networks and CLECs bear the cost of terminating calls originating on ILEC networks. Similarly, each carrier derives benefits from the arrangement, i.e., the ability to have calls terminated without the added transaction costs of billing. The mutuality of the costs and benefits is equitable because the respective costs and traffic patterns are likely to be in balance and the carriers are likely to share the same busy hours.[37]

Thus, both carriers incur costs and benefits under bill and keep. In the case of the interconnection, transport and termination of wireline CLECs and ILECs, the magnitude of those costs will be very similar.

2. Bill And Keep Is Unlikely To Create The Inefficiencies Described By The ILECs.

Based on their assertion that bill and keep will allow CLECs to "free ride" on their network investment, ILECs argue that bill and keep will cause inefficiencies. For example, they assert that bill and keep could produce inefficient investment decisions by CLECs. Again, this ignores the fact that the CLEC is also foregoing collecting terminating revenues under bill and keep arrangements. It also ignores the CLECs' incentives to order termination in the optimally efficient manner.

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[37] See Comments of TCI at 34-37.